# United States Court of Appeals

FIFTH CIRCUIT

No. 15,512

W. FRANK LEE, JR., as Administrator of the Estate of W. FRANK LEE, Deceased, and ANNE H. LEE, surviving wife,

Petitioners,

*v.*

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

PETITION FOR REVIEW OF DECISIONS OF THE TAX COURT OF THE UNITED STATES (DISTRICT OF GEORGIA).

## PETITION FOR REHEARING

Petitioners, W. Frank Lee, Jr., as Administrator of the Estate of W. Frank Lee, deceased, and Anne H. Lee, surviving wife (now deceased), by Richard Steel, their counsel, respectfully petition for a re-hearing of the appeal and decision herein insofar as this Court determined that the record contains clear and convincing evidence that the respondent sustained the burden of proof imposed upon him by Section 1112 of the Internal Revenue Code (26 U.S.C. 1952 ed., Sec. 1112); viz, that the deceased taxpayer intentionally and wilfully filed various fraudulent income tax returns with the specific purpose to evade the taxes he believed to be owing.

## I

These consolidated proceedings involve Federal income tax deficiencies computed by the net worth method and fraud penalties against W. Frank Lee, Jr., as administrator of the Estate of W. Frank Lee, deceased, for the taxable years and in the amounts hereinafter indicated (R. 366):

| *Taxable Year Ended* | *Income Tax Deficiency* | *Sec. 293(b) Penalty* | *Sec. 291(a) Penalty* |
|---|---|---|---|
| 2/28/42 | $ 728.16 | $ 364.08 | .... |
| 2/28/43 | 3,371.70 | 1,685.85 | .... |
| 2/29/44 | 6,129.66 | 3,161.80 | .... |
| 2/28/45 | 13,215.22 | 6,741.98 | .... |
| 2/28/46 | 9,236.88 | 4,618.44 | .... |
| 2/28/47 | 4,600.30 | 2,300.15 | $230.02 |
| 2/29/48 | 7,014.15 | 3,507.08 | .... |
| | $44,296.07 | $22,379.38 | $230.02 |

together with Federal income tax deficiencies and one fraud penalty against the deceased Taxpayer and Anne H. Lee, surviving wife, for the taxable years ended February 28, 1949 and February 28, 1950 in the following amounts (R. 367):

| *Taxable Year Ended* | *Income Tax Deficiency* | *Sec. 293(b) Penalty* |
|---|---|---|
| 2/28/49 | $3,898.76 | $1,949.38 |
| 2/28/50 | 1,335.70 | |
| | $5,234.46 | $1,949.38 |

## II

Petitioners duly filed in the Tax Court of the United States petitions for a re-determination of the assessments. After a trial Findings of Fact were made and an Opinion filed by Mr. Justice Rice of that Court, dated July 31, 1953

sustaining the Commissioner in substantially all his contentions (12 TCM 861; R. 350-365 inc.). A Decision was duly entered in said Court on the 10th day of September, 1954. The deficiency Taxes and all penalties have been paid.

## III

Thereafter Petitioners filed their Petition for Review of the decision of the Tax Court of the United States as aforesaid. The record and briefs were duly filed in this Court and the matter came on for argument on October 4th, 1955, before Chief Judge Hutcheson, Circuit Court Judge Borah and Circuit Court Judge Cameron, sitting in Atlanta, Ga.

## IV

On November 25, 1955, this Court duly handed down its opinion and decision in writing affirming the decision below with an opinion by Chief Justice Hutcheson in which Circuit Court Judge Borah concurred. Circuit Court Judge Cameron filed a dissenting opinion.

## V

Pursuant to an order of Mr. Chief Justice Hutcheson filed the 12th day of January 1956, the Petitioners were granted an extension to and including January 25, 1956, within which to file a petition for re-hearing in this Court.

## VI

On November 2, 1955, one of the Petitioners, Anne H. Lee, surviving wife, died in Washington, Ga. and a proceeding is now pending in the Ordinary's Court of Wilkes County, Georgia, for the appointment of an administrator of her estate.

## VII

The Petitioners seek a re-hearing of the decison of this Court insofar as it held that the Record contains clear and convincing evidence that the Commissioner had sustained the burden of proof imposed upon him by law (26 USC 1952, ed Sec. 1112).

## VIII

The grounds for Petitioners' request are as follows:

(a) Never previously has any Court construed the Tax fraud statute to the effect that the Commissioner of Internal Revenue had sustained the burden imposed upon him by law by merely showing a substantial increase in income by the net worth method, unless such increase was supplemented by clear and convincing proof that the taxpayer had been engaged in illegal enterprises, had an income from unreported sources, or had been involved in other suggestively fraudulent manipulations and maneuvers. No such supplementary proof appears in the Record at bar.

(b) The authorities cited in the majority opinion of this learned Court do not hold otherwise. The evidence in each of said cases contained affirmative proof of supplementary facts in addition to the net income increase to warrant a fraud finding.

In *Bryan* v. *Commissioner,* 209 Fed. 2nd 822 (C. A. 5th, 1954), it was proved that the taxpayer had operated a gambling club, had been a bootlegger and had rented two houses for prostitution.

In *O'Dwyer* v. *Commissioner,* 110 Fed. 2nd 925 (C. A. 5th, 1940), it was proved that the taxpayers, were gamblers and had maintained no books.

In *Boyett* v. *Commissioner*, 204 Fed. 2nd 205 (C. A. 5th, 1953), the increased income proved by the Commissioner was supplemented by affirmative evidence that the husband taxpayer, a dentist, had maintained bank accounts in either "dummy" names or those of third party nominees, from time to time had rented nine safe deposit boxes, had given instructions to two banks which created inferences of suspiciously fraudulent transactions, had cashed fee checks. Circuit Judge Strum of this Court sustained the fraud penalties assessed in that case by reason of the suggestively fraudulent circumstances above indicated.

It is respectfully contended that in its majority opinion in the case at bar this learned Court overlooked the fact that the Record fails to contain clear and convincing evidence of any fraudulent intent on the part of the deceased taxpayer. *Jemison* v. *Commissioner*, 45 Fed. 2nd 4 (C. A. 5th, 1930). *Mitchell* v. *Commissioner*, 118 Fed. (2d) 308, 310 (C. A. 5th, 1941).

In the following authorities the respective Courts have held that mere proof of an understatement of income without direct or circumstantial evidence of a fraudulent intent to supplement the same does not meet the requirements of burden of proof imposed upon the Commissioner. *Davis, et ux.* v. *Commissioner*, 184 Fed. (2nd) 86 (C. A. 10th, 1950). *Griffiths* v. *Commissioner*, 50 Fed. (2nd) 782 (C. A. 7th, 1931); *Ferrara* v. *Commissioner*, 10 TCM 141, 143 (1951), Dkt. No. 23274.

(c) It is respectfully contended that the holding at bar in effect nullifies the requirements of the statute that the burden of proving fraud on the part of the deceased taxpayer was upon the Commissioner. Admittedly, the burden of proving error in the Commissioner's determination of a tax deficiency was upon the Petitioners. The prevailing opinion implies that Petitioners' failure to disprove the accuracy of the Commissioner's computations

of a substantial deficiency automatically sustains the assessment of fraud penalties. It follows in such event that the Commissioner need offer no affirmative proof whatsoever of a fraudulent intent.

(d) It is respectfully contended that this Court overlooked the fact that the deceased taxpayer, W. Frank Lee, was an honorable and respected business man residing in Washington, Georgia; had never engaged in any illegal activities; had no unreported sources of income; had maintained a set of single entry books for his business of a type not uncommon in small communities and although there was some code symbol at the end of each accounting period, taxpayer followed the identical bookkeeping system since 1906, seven years prior to the enactment of the 16th Amendment to the United States Constitution. The record is completely barren of any affirmative evidence to support a fraudulent intent on the part of the deceased taxpayer.

## IX

This petition for re-hearing is filed in good faith and not for the purpose of delay.

Wherefore, Petitioners pray that this Court grant them a re-hearing upon the issue as to whether the Record contains clear and convincing evidence offered by the Respondent in support of his burden of proving that the deceased taxpayer intentionally and wilfully filed fraudulent income tax returns with the specific purpose to evade taxes he believed to be owing.

Richard Steel,
Counsel for Petitioners on Review.

No. 61 Broadway,
New York 6, N. Y.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RICHARD STEEL, being duly sworn on oath, says that he is counsel for Petitioners on Review in the foregoing matter and as such is duly authorized to verify the foregoing Petition for Rehearing; that he has read the Petition and is familiar with the contents thereof; that he believes the allegations contained in the Petition to be true, and said Petition is true according to his best information and belief, and that Petitioners are justly entitled to the relief sought.

RICHARD STEEL.

Sworn to before me this
20th day of January, 1956.

LORETTA E. LOPEZ,
Notary Public,
State of New York.
No. 24-2401780.
Qualified in Kings County.
Commission Expires March 30, 1957.

## Certificate of Service

It is hereby certified that service of three copies of the within petition for re-hearing has been made on opposing counsel, by mail, in accordance with the rules of the United States Court of Appeals for the Fifth Circuit.

Dated: January 20th, 1956.

RICHARD STEEL,
Counsel for Petitioners.